

CHAPTER 8

MARITAL DISSOLUTION - DIVORCE

A. INTRODUCTION

Effective January 1, 1996, the State of Idaho no longer recognizes newly created common law marriages. Prior to January 1, 1996, individuals could create a common law marriage by a mutual assumption of marital rights, duties or obligations. Any common law marriage created prior to January 1, 1996, will still be recognized. However, after January 1, 1996, parties must obtain a marriage license and have a marriage ceremony performed. A marriage, whether ceremonial or common law, is ended only by the death of a spouse or formal annulment or divorce proceedings.

B. SEPARATION

In 1994, the Idaho Legislature amended the divorce statutes to create a decree of legal separation. The court may enter a decree of legal separation upon motion of either party, and the process is similar to the process followed in divorce actions. Under either a legal separation or divorce, a couple may elect to live separate and apart and ask the court to divide property, settle debts, provide custody and visitation, and obtain child support and spousal support.

C. ANNULMENT

An annulment differs from divorce in that the grounds for the annulment must exist at the time of marriage. Annulment is legally available if: (1) a person was under the age of legal consent (18); (2) one party was already married; (3) a party was of unsound mind; (4) the consent to the marriage was obtained by fraud; (5) the consent to the marriage was obtained by force; (6) either party was physically incapable of entering into a married state due to impotency.

Although an annulment voids the marriage from the beginning, children born of the relationship are legitimate. Child support is treated similarly to child support in a divorce.

D. GROUNDS FOR DIVORCE

Idaho specifies eight grounds for divorce: (1) adultery; (2) extreme cruelty; (3) willful desertion; (4) willful neglect; (5) habitual intemperance (alcoholism); (6) conviction of felony; (7) permanent insanity; and (8) irreconcilable differences. The most frequently used ground for divorce is irreconcilable differences. Irreconcilable differences simply means certain differences have arisen that the spouses are unable to resolve. Irreconcilable differences are the “no-fault” grounds for divorce in Idaho.

E. BASIC PROCEDURES FOR DIVORCE

1. RESIDENCY REQUIREMENTS

Before you may file for divorce in Idaho you must have resided in Idaho for at least six weeks. This means you must be physically present within the state of Idaho with the intention to remain in Idaho indefinitely.

2. FILING THE COMPLAINT

Divorce proceedings begin with the filing of a complaint. The complaint is really a “wish list” of the filing party. It contains a request that the court system end the marriage and sets out in great detail what the filing spouse wishes the court to order in the final decree with respect to a division of property and financial obligations and care and support of the children of the marriage.

The spouse filing for the divorce must make sure the other spouse formally receives a copy of the complaint and the summons. The summons informs the nonfiling spouse that a divorce action has been filed and a written response, called an answer, must be filed within 20 days. “Formally receives” means either that a process server, such as a deputy sheriff, delivered the papers or the nonfiling spouse accepted service by signing a written statement that in fact the court papers were received.

3. RESPONDING TO A COMPLAINT

A spouse who has been served with a complaint for divorce is presumed to have knowledge of what the complaint contains. The complaint should be carefully reviewed and an appropriate plan of action should be decided upon. A spouse may either (1) decide that

the complaint constitutes a fair resolution and do nothing, which allows the judge to enter a final decree of divorce identical to the complaint; or (2) file a written answer in which a reply is made paragraph by paragraph to the complaint.

4. COURT RESOLUTION

If the nonfiling spouse files an answer and the spouses cannot reach an agreement that satisfactorily resolves their differences, the case is set for trial. Because there may be a lengthy period of time between the time the complaint is filed and when the divorce goes to trial, it may be necessary to get temporary orders regarding child custody, child support and alimony. This can be done by having a court hearing prior to the time of trial.

A divorce proceeding is tried before a judge, without a jury. Both parties are provided with an opportunity to testify and present evidence and witnesses to convince the judge that the divorce decree ought to be worded as requested. The judge enters a final decision, called the decree of divorce, which may address any part of the marriage relationship, including future financial relationships, property ownership, responsibility for financial obligations and every imaginable situation which might arise regarding the children of the marriage until they reach age 18. If either party disagrees with the judge's decision, appeal to a higher court is available.

F. DIVORCE MEDIATION

Mediation is a problem-solving process in which the parties themselves resolve the problems that arise because of the divorce. Parties may engage the services of a professional mediator, or in some counties will be required to mediate a custody dispute. Rule 16(j) of the Idaho Rules of Civil Procedure states that a court "shall" order mediation if, in the court's discretion, it finds mediation is in the best interest of the children.

Many counties now have a process whereby contested cases are automatically referred to mediation under this rule. Such problems might include defining a parenting arrangement for the children, establishing support levels, or dividing marital assets and debts. As an impartial third party, the mediator facilitates the negotiation between the parties so that a fair agreement may be reached. The mediation process is not a substitute for legal advice or for court involvement; however, it provides an alternative to a litigated hearing on disputed issues. The mediated agreement is usually presented to the court for approval.

G. WHERE TO GET LEGAL HELP

1. NEED FOR LEGAL ASSISTANCE

In most divorce actions it is important that each party has its own attorney. Your own attorney can most adequately protect your legal interests. Feel free to consult with several attorneys before you retain one to represent you. Some attorneys do not charge for the initial consultation. It is important that you have confidence in your attorney and are able to communicate freely with her or him.

You should discuss costs with your prospective attorney. Costs include the court required fee for filing the divorce as well as fees for the service of summons. How much your attorney charges for services depends upon the complexity of the divorce. Attorneys generally charge on an hourly rate, which varies from attorney to attorney depending upon experience. The more hotly contested and involved the issues are, such as child custody and property division, the greater the attorney time involved.

2. REPRESENTING YOURSELF

You may file your own divorce papers and represent yourself in the divorce action. This is advisable only where both parties agree to everything or the nonfiling party has disappeared and is unlikely to contest the divorce. Legal forms for divorces are available at no cost from Court Assistance offices in each county. Some community education programs provide classes on divorce law.

An excellent handbook, entitled "Making Financial Decisions When Divorce Occurs," is published by the University of Idaho Cooperative Extension Service and the Idaho Women's Commission. It is available for \$3.00 from the University of Idaho Cooperative Extension System, Agricultural Publications, Agricultural Communications Center, University of Idaho, Moscow, Idaho 83844-2332.

3. ASSISTANCE IN OBTAINING AN ATTORNEY

If you wish to hire a lawyer but do not know whom to hire, there are several avenues you may pursue. Getting a recommendation from friends and acquaintances is often helpful. The Idaho State Bar (208-334-4500) lawyer referral service maintains a list of attorneys who handle divorce matters. Additionally, lawyers do advertise. Many attorneys now list in the yellow pages the areas of the law they prefer to handle.

Idaho Legal Aid Services, Inc., handles a limited number of divorce cases for people below the poverty income guidelines. However, these cases must involve either spousal or child abuse. Call your nearest Idaho Legal Aid office for assistance.

The Idaho State Bar maintains the Volunteer Lawyer Program (208-334-4510), which assists individuals who cannot afford to pay for legal advice in obtaining a lawyer. Lawyers who participate in the program either charge nothing or bill for their services at a much reduced rate.

H. PROPERTY DIVISION

A presumption exists that all property acquired during the marriage is community property. This presumption can be overcome by establishing that the property was acquired as a gift or inheritance during the marriage. Community property includes military retirement benefits, disability insurance payments made during the marriage and pension plans earned during the marriage. Idaho is not likely to consider professional degrees to be community property, because other states do not. However, Idaho courts have not yet decided the issue.

Separate property generally includes that property owned by each spouse when the marriage began and property acquired by one spouse during the marriage by gift or inheritance. Separate property is sometimes converted during the marriage to community property as a result of the way the parties treated the property.

If community funds or community effort were used to improve the separate property of either spouse, the community may be entitled to reimbursement. If the parties commingle separate and community funds so that they cannot be traced, the funds become community property. In dividing community property upon divorce, the court is required to divide the community property in a substantially equal fashion unless compelling reasons exist for a different division. A “substantially equal fashion” does not require an exact 50-50 division.

Factors the court may consider include: the duration of the marriage; agreements between the parties; the age, health, occupation, income, vocational skills and employability of each spouse; the needs of each spouse; present and future earning capacity of each spouse; spousal support to be awarded; and retirement benefits available.

I. TAXES AND OTHER DEBTS

Community debts are generally divided in a substantially equal manner with consideration the property division. Debts incurred during the marriage, including any debts incurred by either spouse during separation, are community obligations. A creditor may enforce the debt on either spouse before or after the divorce as long as the debt was incurred during the marriage. However, if the divorce decree requires one spouse to pay the debt, the other spouse can seek reimbursement from that spouse by having her/him held in contempt through a court hearing. Filing of bankruptcy by one spouse does not relieve the other spouse of the debt. Child support is not dischargeable in bankruptcy.

It is not uncommon for taxing agencies to complete an audit of a joint tax return several years after divorce. By signing a joint tax return during the marriage, you will probably be held liable for the entire tax liability, plus interest and penalties, resulting from an audit of that return, even if your spouse agreed to pay all taxes arising after divorce.

Unless your spouse pays the joint liability, you will be held responsible for paying any unpaid amounts. If you have questions concerning whether you have any defense against being held liable in this situation, you should contact a tax professional or the taxing agency involved.

J. SPOUSAL MAINTENANCE

Before spousal maintenance (alimony) will be granted, the court generally must find that a spouse lacks sufficient property to provide for his or her reasonable needs and is unable to support him or herself through employment. In determining the amount of spousal maintenance, the court considers all relevant factors, including the marital property apportioned to that spouse and that spouse's ability to meet her or his needs independently; the time necessary to acquire sufficient education and training to enable the spouse seeking maintenance to obtain employment; the duration of the marriage; the age, physical and emotional condition of the spouse seeking maintenance; the ability of the spouse from whom maintenance is sought to meet her/his own needs while meeting those of the spouse seeking maintenance; and, the tax consequences to each spouse.

Spousal maintenance is deductible by the payer and reportable as income by the payee. A divorced spouse may still be eligible for group medical insurance coverage under the former spouse's employer. Please see Chapter 4, section F, #8 COBRA.

K. NAME CHANGE

You may have your name changed upon divorce. It is best to request the name change in the complaint or answer. You may change your name to any name you wish to use, as long as the change is not for fraudulent purposes.

L. CUSTODY

Custody issues may exist prior to, during and after a divorce. Parents are strongly encouraged to create a custody and parenting plan for the child for review by the court. The court retains the power, even after the divorce decree is issued, to review a custody or parenting plan and to issue custody orders. The court's concern is the best interests of the child, not the convenience or anger of the parents. Courts attempt to preserve the parent-child relationship despite the marital dissolution.

A presumption exists in Idaho that joint legal and physical custody is in the best interest of the child. Therefore, the court usually grants joint legal and physical custody of the child unless there are specific reasons to do otherwise such as one of the parents being found by the court to be a habitual perpetrator of domestic violence.

Legal custody involves the right of the parent to be involved in the decision-making, rights, responsibilities and authority relating to the health, education and general welfare of a child. Physical custody refers to with whom the child is physically residing. Joint physical custody does not necessarily mean that each parent will have physical custody of the child 50% of the time. More often one parent is granted primary physical custody, with the other parent given visitation rights.

Factors the court considers in awarding custody include: the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with parents and with siblings; the child's adjustment to home, school and community; the mental and physical health and integrity of all individuals involved; the need to promote continuity and stability in the life of the child; and, any history of domestic violence, whether or not that violence occurred in front of the children.

The court may grant sole legal and physical custody to one parent if the other parent is unable to care for the child, or if there is evidence of physical or mental abuse, alcoholism, drug addiction, abandonment or similar circumstances.

Grandparents who have established a relationship with their grandchildren have rights to visitation regardless of who is awarded custody of the children. If necessary, grandparents can obtain court ordered visitation periods.

M. CHILD SUPPORT

Both parents owe reciprocal duties to support their children. The amount of support required from each parent varies depending upon each parent's income.

Ordinarily the parent's community property interest in the financial resources or obligations of a spouse who is not a parent of the child will not be considered in setting a child support obligation, unless compelling reasons exist. Child support must cover a child's basic needs. Child support is payable until the child attains the age of 18. However, if the child is in high school, then support is payable until the child is 19 years old, or graduates, whichever is sooner.

The Idaho Supreme Court has adopted a set of guidelines for determining the proper amount of child support. These guidelines have also been adopted by the legislature. The basic child support obligation is based upon the gross income of both spouses, according to the rates set out in the schedules below:

	Per Month	Per Year
One (1) Child		
18% of the 1st \$10,000 of combined Guideline income	\$150	\$1,800
17% of the next \$10,000 of combined Guideline income	142	1,700
15% of the next \$10,000 of combined Guideline income	125	1,500
14% of the next \$10,000 of combined Guideline income	117	1,400
13% of the next \$10,000 of combined Guideline income	108	1,300
10% of the next \$20,000 of combined Guideline income	167	2,000
7% of the next \$20,000 of combined Guideline income	117	1,400
4% of the next \$20,000 of combined Guideline income	67	800
3% of the next \$20,000 of combined Guideline income	50	600
3% of the next \$20,000 of combined Guideline income	50	600
	\$1,092	13,100
Two (2) Children		
26% of the 1st \$10,000 of combined Guideline income	\$217	\$2,600
25% of the next \$10,000 of combined Guideline income	208	2,500

23% of the next \$10,000 of combined Guideline income	192	2,300
22% of the next \$10,000 of combined Guideline income	183	2,200
20% of the next \$10,000 of combined Guideline income	167	2,000
15% of the next \$20,000 of combined Guideline income	250	3,000
10% of the next \$20,000 of combined Guideline income	167	2,000
7% of the next \$20,000 of combined Guideline income	117	1,400
6% of the next \$20,000 of combined Guideline income	100	1,200
6% of the next \$20,000 of combined Guideline income	100	1,200
	\$1,700	\$20,400

	Per Month	Per Year
Three (3) Children		
30% of the 1st \$10,000 of combined Guideline income	\$250	\$3,000
29% of the next \$10,000 of combined Guideline income	242	2,900
27% of the next \$10,000 of combined Guideline income	225	2,700
26% of the next \$10,000 of combined Guideline income	217	2,600
24% of the next \$10,000 of combined Guideline income	200	2,400
20% of the next \$20,000 of combined Guideline income	333	4,000
13% of the next \$20,000 of combined Guideline income	217	2,600
10% of the next \$20,000 of combined Guideline income	167	2,000
9% of the next \$20,000 of combined Guideline income	150	1,800
9% of the next \$20,000 of combined Guideline income	150	1,800
	\$2,150	\$25,800

Four (4) Children		
32% of the 1st \$10,000 of combined Guideline income	\$267	\$3,200
31% of the next \$10,000 of combined Guideline income	258	3,100
29% of the next \$10,000 of combined Guideline income	242	2,900
28% of the next \$10,000 of combined Guideline income	233	2,800
26% of the next \$10,000 of combined Guideline income	217	2,600
21% of the next \$20,000 of combined Guideline income	350	4,200
16% of the next \$20,000 of combined Guideline income	267	3,200
13% of the next \$20,000 of combined Guideline income	217	2,600
12% of the next \$20,000 of combined Guideline income	200	2,400
12% of the next \$20,000 of combined Guideline income	200	2,400
	\$2,450	\$29,400

Five (5) Children		
35% of the 1st \$10,000 of combined Guideline income	\$292	\$3,500
33% of the next \$10,000 of combined Guideline income	275	3,300
31% of the next \$10,000 of combined Guideline income	258	3,100
30% of the next \$10,000 of combined Guideline income	250	3,000
28% of the next \$10,000 of combined Guideline income	233	2,800
24% of the next \$20,000 of combined Guideline income	400	4,800
19% of the next \$20,000 of combined Guideline income	317	3,800
16% of the next \$20,000 of combined Guideline income	267	3,200
15% of the next \$20,000 of combined Guideline income	250	3,000
15% of the next \$20,000 of combined Guideline income	250	3,000
	\$2,792	\$33,500

Certain adjustments are made for alimony, preexisting child support obligations and health insurance. The court may require additional financial assistance to cover child care costs incurred by the custodial parent or may reduce the amount of support where there is shared physical custody. When both spouses have income the amount of child support awarded is prorated between the spouses in proportion to their gross incomes.

A copy of the Idaho Child Support Guidelines is available from the Administrative Office of the Courts, 451 W. State Street, Boise, Idaho 83720.

N. CHILD SUPPORT ENFORCEMENT

The parent most willing to pay child support is one who is actively involved with the child. The most important thing a custodial parent can do to insure prompt payment of child support is to maintain a cordial relationship with the paying parent and encourage visitation with the children. If the noncustodial parent has never been a good provider, it is unrealistic to expect that will change just

because there is a support order requiring support payments. If the noncustodial parent fails to pay support, assistance is available through your local prosecuting attorney, the Health and Welfare Bureau of Child Support Enforcement and private attorneys.

Most child support orders issued in Idaho require the supporting parent to pay the Bureau of Child Support Enforcement, Department of Health and Welfare. If a support order requires payment through an agency, insist that the payments be made only through that agency to insure a complete and accurate record of payments. This is important for both parents.

Support orders issued in Idaho after July 1, 1986, likely contain "Notice of Income Withholding." This allows the custodial parent to enforce the order by an income withholding order issued by the court to the supporting parent's employer. If the supporting parent fails to pay support and the child support order includes a "Notice of Income Withholding," you may go to the clerk of court where you obtained the support order and request the issuance of an income withholding order. The clerk will provide you with the necessary forms. The only cost for this service is postage and envelopes.

If a support order does not contain a "Notice of Income Withholding," or if the supporting parent does not receive income in Idaho, support enforcement services are available through your local prosecuting attorney and the Health and Welfare Bureau of Child Support Enforcement, or you may hire your own attorney. The agency or attorney handling the enforcement of your support order needs your assistance in providing accurate, current information on the supporting parent, such as Social Security number, birth date, address, employment, assets, expensive hobbies and names of relatives and friends.

Many prosecuting attorneys are very effective in enforcing child support, although this varies from county to county, depending upon the staffing of the office and the resources available to the prosecutor. Some Idaho counties have a cooperative agreement with the Bureau of Child Support Enforcement which allows the prosecuting attorney to use the Bureau's support enforcement remedies. The main enforcement remedy used by prosecuting attorneys is an order requiring the parent to show cause why she/he should not be held in contempt for failing to pay support. If the nonpaying parent lives outside of Idaho, the prosecuting attorney can file a URESA petition to the parent's state, requesting that state to enforce the support order.

The Bureau of Child Support Enforcement, Department of Health and Welfare, charges a nominal fee for enforcement of support orders. The Bureau offers the same support enforcement services to nonwelfare clients as it offers to welfare clients. If the client is receiving welfare, all support owed to the client is assigned to the Bureau to offset the cost of welfare.

The Bureau enforces both child support and spousal support orders if the spousal support order is issued in conjunction with a child support order. If the supporting parent receives income, such as wages, unemployment benefits, or workers' compensation benefits, the Bureau issues its own income withholding order to the supporting parent's employer or other source of income.

The Bureau can also collect child support arrears from the supporting parent's state and federal tax refunds. There is a \$25 charge for the tax refund offset, which is charged to the custodial parent and collected from the refund. If the supporting parent lives outside Idaho, the Bureau will either file a URESA petition to the other state, or will forward the support order to the other state for income withholding in that state. More information about services available through the Bureau can be obtained at your local Department of Health and Welfare office.

O. CHILD CUSTODY INTERFERENCE - PARENTAL KIDNAPPING

In Idaho any person who takes or keeps a child from the custodial parent commits the crime of child custody interference. There are limited exceptions to this.

P. MODIFICATIONS

Child visitation and custody, support and spousal maintenance may be reexamined by the court provided that there is a material and permanent change in the circumstances of either party. In fact, parenting arrangements often need reevaluation as the children grow and their needs change. However, absent evidence of fraud or overreaching by either party, property divisions or settlements will not be reexamined or modified at a later time by the court.

Modification proceedings may be costly and even more so if the court determines that the proceeding was vexatious or harassing. In that event, the court may award attorney fees and costs against the party seeking modification. Modification proceedings should be undertaken with care and consideration.

Q. INTERSTATE DISPUTES

1. DIVORCE ISSUES

In those situations where a spouse in another state has filed against you in that state while you are a resident of Idaho, or where you, as the plaintiff, have filed first in Idaho and your out-of-state spouse refuses to be fully involved in the Idaho case, the result is known as a “jurisdictional conflict” between the court systems of the two states. Although it is possible to have two separate divorce cases going at the same time, the two court systems cannot handle the same issues. Issues can be distributed between the courts, with one state declaring the marriage at an end and the other state deciding custody and property issues, for example. In such a situation the assistance of an experienced domestic relations attorney is recommended to protect your interests in each state.

2. UNIFORM INTERSTATE CHILD CUSTODY JURISDICTION ACT (UCCJA)

Because interstate moves throughout a marriage and following divorce are now so common, the divorce courts are flooded with interstate conflicts. To assist in resolving the question of where the case should be tried, most states have passed the Uniform Interstate Child Custody Jurisdiction and Enforcement Act, or UCCJEA.

The UCCJEA is a set of rules which helps the court decide whether the children have enough contact and sufficient ties with a particular state to warrant that the state’s court system should decide the issues of their best interest. The UCCJEA requires the court to consider the following matters before it assumes jurisdiction: has one parent “kidnapped” the child from the care of the other parent and taken the child into another state only to see if he or she can get a favorable custody ruling in that other state- Was there a custody or visitation decision previously entered in this or another state and is there now good reason to modify that decision under the laws of either state- Is there some emergency which justifies a court acting quickly, wherever the child is currently to be found- Is an earlier court order now out of date because of changed circumstances in the lives of the child or the competing parents- One of the most important considerations in resolving jurisdiction under the UCCJEA is the length of time a child has been a resident of a particular state. Generally a court will consider taking jurisdiction if a child has been present in the state for longer than six months.

It is assumed that during this six-month residency evidence will have accumulated concerning the child’s relationship with the custodial parent and other relatives, performance in school, recreational interests, etc. This six-month standard is ignored in the case of a parental kidnapping where the child has been taken to another state, concealed and prevented from any contact with the court ordered custodial parent.

If both parents file close in time in two different states, the UCCJEA has a built-in system for determining which court takes control of a case and which court releases control. This involves the judges conferring with one another and deciding between them which court should hear the case.